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MICHAEL RODAK, JR.,

APPENDIX

In the Supreme Court of the United States

October Term, 1972

No. 71-1553

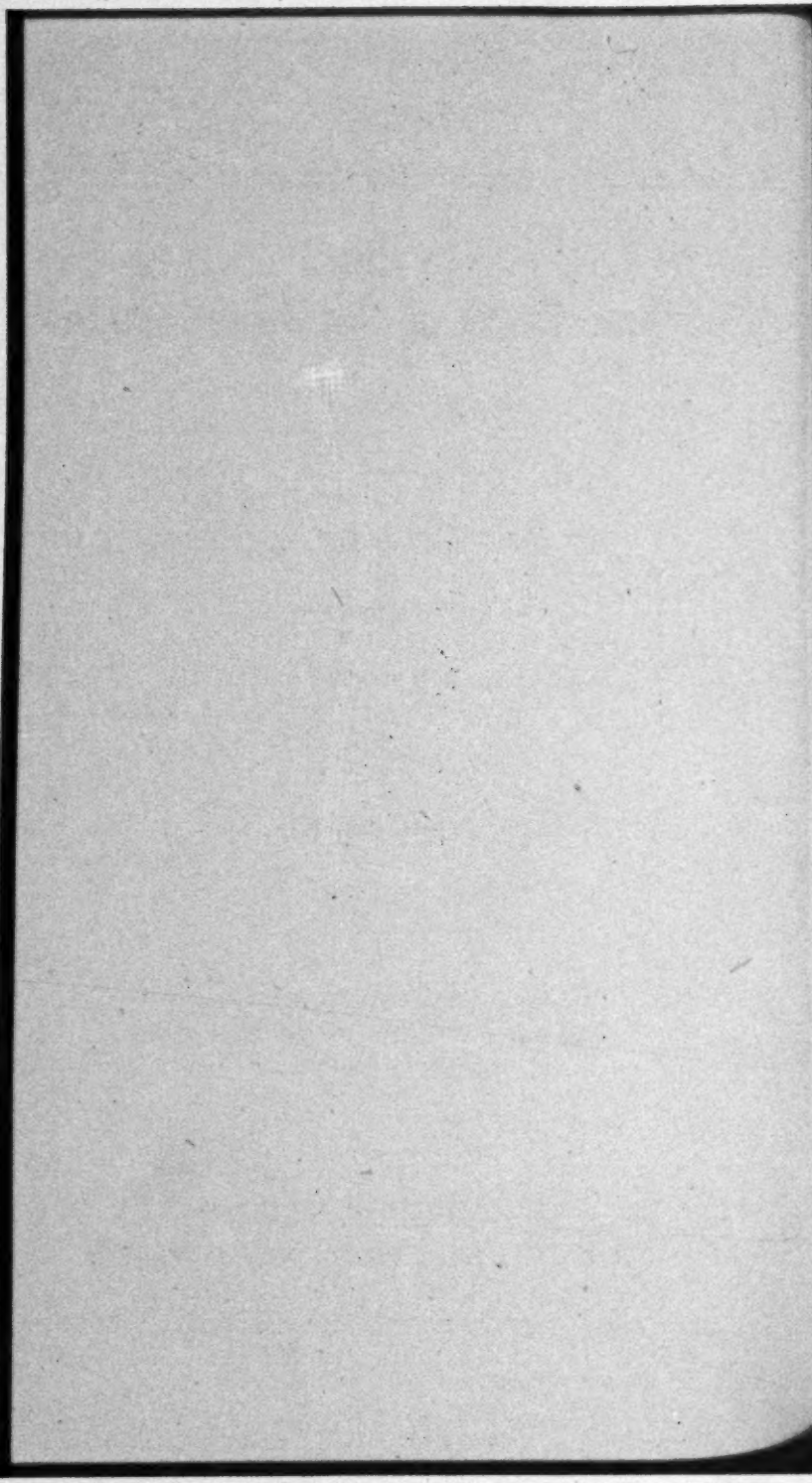
JOHN J. GILLIGAN, GOVERNOR OF OHIO, ET AL.,
Petitioners,

v.

CRAIG MORGAN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 20, 1972
CERTIORARI GRANTED OCTOBER 24, 1972



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INDEX

	Page
Chronological List of Relevant Docket Entries	2
Complaint, filed October 15, 1970	3
Motion to Dismiss; Memorandum in Support of Motion to Dismiss, filed November 30, 1970	12
Order Dismissing Complaint, filed March 4, 1971	14
The Decision of the Court of Appeals (Appended to Petitioners' Petition for a Writ of Certiorari)	15

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Date	Proceedings
10-15-70	Complaint filed. Summons issued.
	• • •
11-30-70	Motion of defendants to Dismiss with Memorandum in Support filed. Copy mailed 11-27-70.
	• • •
3-4-71	Order granting defendant's Motion to Dismiss filed, Connell, J. Copies to Weinstein, Bayer, Harshman & Nemeth.
3-23-71	Notice of pltfs. of appeal filed. Copy by Clerk to Weinstein & Nemeth.
3-23-71	Bond on Appeal filed. (Fidelity & Dep. Co. of Maryland)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

4-29-71	Certified record (1 vol. pleadings), filed; and cause docketed.
10-5-71	Cause argued and submitted (Before: Edwards, Celebrezze and McCree, JJ.)
2-15-72	Judgment of the District Court reversed and the case remanded for further proceedings.
2-15-72	Opinion by Edwards, J. (Celebrezze, J. concurring in part and dissenting in part.)
	• • •
5-18-72	Copy of letter from Clerk of Supreme Court to counsel for Appellee advising that time for filing petition for writ of certiorari was extended on 5-15-72 to 5-22-72.
6-5-72	Notice of filing petition of John J. Gilligan, Governor of Ohio, for certiorari 5-20-72 (Sup. Ct. No. 71-1553)
6-20-72	Certified record for certiorari application, including original record on appeal, mailed to Supreme Court.

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RELEVANT PLEADINGS AND OPINIONS

COMPLAINT

(Signatures and acknowledgments omitted)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CRAIG MORGAN
THOM DICKERSON
and
WILLIAM SLOCUM
suing individually and on behalf of all others similarly situated
Plaintiffs,

—vs—

JAMES RHODES
Governor of Ohio
State House
Columbus, Ohio

SYLVESTER DEL CORSO
Adjutant General of The Ohio National Guard
Fort Hayes
Columbus, Ohio

ROBERT CANTERBURY
Assistant Adjutant General of The Ohio National Guard
Fort Hayes
Columbus, Ohio
Defendants.

Case No. C 70-961

COMPLAINT

Plaintiffs, by their attorney, Harold Weinstein, for their complaint herein, allege:

1. Plaintiff Morgan is a full-time student enrolled in Kent State University and is President of Kent State University's student body. Plaintiff Morgan is a resident of Columbus, Ohio.

2. Plaintiff Dickerson is a full-time student enrolled in Kent State University and is Vice-President of Kent State University's student body. Plaintiff Dickerson is a resident of Huntington, New York.

3. Plaintiff Slocum is a full-time student enrolled in Kent State University and is President Pro Tem of Kent State University's student senate. Plaintiff Slocum is a resident of Geneva, Ohio.

4. Plaintiffs bring this action in their individual capacities and also on behalf of all persons who are students of Kent State University and are, as a consequence, similarly situated. (Referred to hereafter as "other students.") The class is so large that joinder of all members is impracticable. There are questions of law and fact common to the claims of plaintiffs and those of the other students, and plaintiffs' claims are typical of those of the entire class. Defendants, and their agents, have acted, and threaten to act, toward the entire class in such a manner as to make appropriate an injunction and declaratory judgment on behalf of the entire class.

5. Defendant Rhodes is Governor of Ohio and, pursuant to his office, is Commander-in-Chief of the Ohio National Guard and has authority to call to active duty, supervise and direct, the operations of Ohio National Guard troops.

6. Defendant Del Corso is a general of the Ohio National Guard, is Adjutant General of the Ohio National Guard and directs and supervises the training, procedures and operations of the Ohio National Guard.

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7. Defendant Canterbury is a general of the Ohio National Guard, is Assistant Adjutant General of the Ohio National Guard and, upon information and belief, assists Defendant Del Corso in directing and supervising the training, procedures and operations of the Ohio National Guard. Defendant Canterbury was in direct command of a contingent of Ohio National Guard troops which had been called to active duty and assigned, on or about May 2, 1970, to operate in and about the main campus of Kent State University, as set forth in greater detail below.

8. Kent State University is a State University organized and operated pursuant to the laws of Ohio and has its main campus in the City of Kent, Portage County, Ohio. From about May 1, 1970, to May 4, 1970, Kent State University was the scene of certain demonstrations and disorders, as set forth in greater detail below. Any references hereafter to events at "The Kent Campus" refer to Kent State University's main campus.

9. This Court has jurisdiction of this action pursuant to Title 42, United States Code, Section 1983 and Title 28, United States Code, Sections 1343 (3) and 2201, in that plaintiffs seek to redress the deprivation, under color of State law, of rights, privileges and immunities secured by the Constitution of the United States by means of injunctive relief and a declaratory judgment.

10. On or about May 1, 1970, there occurred certain disorders in the area of the Kent campus which resulted in the imposition of a curfew by the mayor of Kent. Thereafter, demonstrations and disorders continued in and about the Kent campus.

11. On May 2, 1970, Defendant Rhodes ordered certain contingents of the Ohio National Guard to duty in and around the Kent campus under the supervision and direction of Defendants Del Corso and Canterbury. Thereafter,

the Ohio National Guard troops, under the continued direction of defendants, committed certain acts which, as set forth below, deprived plaintiffs and other students of rights, privileges and immunities secured by the United States Constitution.

The actions and operating methods of the Ohio National Guard, together with a continuation of the same rules, procedures and operating methods followed by the Ohio National Guard under defendants' supervision and direction creates a substantial threat of repetition of similar acts and continues to deprive plaintiffs and other students of rights, privileges and immunities secured by the United States Constitution.

12. Specifically, plaintiffs complain of the following past and continuing acts and conditions:

(a) Defendant Rhodes prematurely ordered Ohio National Guard troops to duty in and around the Kent campus to maintain order and perform functions normally reserved to police officers at a time when there was neither an invasion nor a breakdown of civilian authority and when civilian police forces were capable of administering civilian laws and maintaining order. The displacement of civilian police under such circumstances by a military force itself deprived plaintiffs and other students of rights secured by the First and Fourteenth Amendments, in that the presence of a military force inhibited the exercise of the rights of lawful assembly, speech and association. In addition, the unnecessary use of a military force to perform the functions of civilian police substantially increased the risk of legally unjustified killing and injuring of civilians. On May 4, 1970, members of the Ohio National Guard fired their guns into a crowd of persons on the Kent State University main campus, injuring several students and killing four. The culpable and legally unjustified shooting

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of unarmed civilians by Ohio National Guard troops deprived such persons of life and liberty without due process of law. Unless this court enjoins Defendant Rhodes from prematurely displacing normal civilian authority with Ohio National Guard troops, plaintiffs and other students are imminently threatened with similar deprivations of life and liberty without due process of law and further deprivation of rights secured by the First and Fourteenth Amendments to the United States Constitution as a result of the unnecessary presence of a military force in and about the Kent campus. This threat is a real one and is exacerbated by Defendant Rhodes' actions in following a pattern throughout the State of Ohio of continued and premature use of Ohio National Guard troops to displace civilian authority far in excess of the National norm.

(b) Defendants failed to adequately provide Ohio National Guard troops with specialized training in control of civilian disorders or to provide them, when assigned to the Kent campus, with adequate equipment for dealing with civilian disorders by means other than the use of deadly force when such equipment, better adapted for dealing with civilian disorders than that utilized by the Ohio National Guard troops at the Kent campus, was available. Defendants also caused and ordered Ohio National Guard troops to carry live bullets ready for firing in their guns when on duty in and about the Kent campus. The use of inadequately trained troops, their lack of equipment adapted for control of civilian disorders, and the use by Ohio National Guard troops of guns loaded with live bullets to control civilian disorders substantially increased the risk of the injuries and killings which occurred and, therefore, the deprivations of life and liberty without due process of law which occurred on May 4, 1970. This risk remains and constitutes a real threat to plaintiffs and other students of further deprivations of life and liberty without due process of law. Defendants continue to inadequately train Ohio Na-

tional Guard troops for civilian disorder control, continue to fail to equip them with adequate equipment for dealing with civilian disorders and to cause and order them to carry live bullets loaded in their guns while on duty during civilian disorders. In addition, defendants have failed to instruct and order Ohio National Guard troops to limit their use of deadly force during civilian disorders to those instances in which deadly force could lawfully be used by police officers.

(c) Defendants permitted and caused Ohio National Guard troops to (1) engage in unlawful and unjustified beatings of students in and around the Kent campus. Beatings were administered to some students by Ohio National Guard troops, in part as a result of the exercise of the rights of speech and assembly by students who were beaten, and others. Defendants also permitted and caused Ohio National Guard troops to unlawfully detain, and cause to be detained, students, some as a result of the exercise by such students, and others, of the rights of speech and assembly. These actions of defendants, and their agents, have deprived persons of liberty without due process of law and constituted a direct punishment without due process of law for the exercise of rights protected by the First and Fourteenth Amendments to the United States Constitution. Because of the past actions of defendants' agents and defendants' continued excessive use of Ohio National Guard troops to displace civilian authority during campus disorders, there remains a very real threat that plaintiffs and other students will be subjected to similar beatings and detentions in the future and thereby be deprived of the same rights. The threat of such punishment for exercise of rights protected by the First and Fourteenth Amendments inhibits and intimidates plaintiffs and other students in their exercise of such rights.

(d) Defendants caused and ordered Ohio National Guard troops to break up lawful and peaceable meetings,

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demonstrations and assemblies in and about the Kent campus and thereby deprived plaintiffs and other students of their rights of speech, assembly, association and petition of government. The meetings, demonstrations and assemblies broken up were, in part, protesting against the occupation of the campus by a military force. Defendants' actions violated the First and Fourteenth Amendments to the United States Constitution and substantially increased the risk of the unjustified killings and injuries which occurred on the Kent campus on May 4, 1970. They were not legitimatized by the application of concepts of Martial Law, because there was neither an invasion nor breakdown of civilian authority. Moreover, to the extent that any provision of Ohio law either authorize the imposition of Martial Law except during time of invasion or breakdown of civil authority, or authorized a suspension of First Amendment rights as a consequence of the declaration of Martial Law, lawful or otherwise, they violate the First and Fourteenth Amendments to the United States Constitution. Defendants' past action in ordering Ohio National Guard troops to break up lawful assemblies creates a real threat to plaintiffs and other students that, if they participate in lawful activities they will be assaulted, killed, injured or unlawfully detained by Ohio National Guard troops.

(e) Defendants, and their agents, acted in part under the authority of Section 2923.55 of the Ohio Revised Code which provides, in pertinent part, that "members of the organized militia . . . when engaged in suppressing a riot or in dispersing or apprehending rioters and after an order to desist and disperse has been issued pursuant to Section 2923.51 of the Revised Code, are guiltless for killing, maiming or injuring a rioter as a consequence of the use of such force as is necessary and proper to suppress the riot or disperse or apprehend rioters." Section 2923.55 threatens plaintiffs and other students with deprivation of life and liberty without due process of law in violation of the Four-

teenth Amendment to the United States Constitution in that it authorizes the injuring, killing and maiming of rioters by Ohio National Guard members and substantially increases the risk of use of deadly force in civilian disorders, thereby threatening not only rioters but all other persons in the vicinity of civilian disorders. Section 2923.55 further invidiously discriminates against persons who might, even erroneously, be identified as a rioter during civilian disorders, on no rational basis and singles out such persons for injuring, killing or maiming. Moreover, the existence of Section 2923.55, in connection with the other violations of rights set forth in this paragraph, increases the risk of further injury and killing of students, including plaintiffs, and therefore constitutes an imminent threat of deprivation of plaintiffs, and the other students, of the rights set forth above.

13. Plaintiffs and other students have no adequate remedy at law, because of the threat that irreparable harm, in the form of further deprivations of privileges, rights and immunities protected by the First and Fourteenth Amendments to the United States Constitution, will be effected by defendants, and Ohio National Guard troops operating under their direction, unless the relief sought in this action is granted. This controversy is neither moot nor unripe for decision, because the practices and conditions which resulted in the past violations alleged in this complaint still obtain and directly threaten plaintiffs and other members of their class.

WHEREFORE, plaintiffs request that this Court enter judgment as follows:

(a) Enjoining Defendant Rhodes, and his successors in office, from ordering Ohio National Guard troops to maintain order or replace normal police forces in and about the Kent campus except in case of actual invasion or such breakdown of civilian authority that available civilian police forces are incapable of maintaining public order and

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administering the laws, and declaring any contrary use of Ohio National Guard troops in and about the Kent campus to be unlawful.

(b) Enjoining Defendants Rhodes, Del Corso and Canterbury, and their successors in office, from using Ohio National Guard troops for the control of civilian disorders in and about the Kent campus unless such troops have been competently trained in techniques of civilian disorder control, have been provided with the best available non-lethal equipment for use in civilian disorder control, have been specifically ordered and instructed not to use deadly force except in the case of actual self-defense or upon persons who have actually used or threatened the use of deadly force and have been ordered not to carry live ammunition loaded in their guns when engaged in such control of civilian disorders, and declaring the use of Ohio National Guard troops contrary to those requirements to be unlawful.

(c) Enjoining Defendants Rhodes, Del Corso and Canterbury from either ordering or permitting Ohio National Guard troops to beat plaintiffs or other students in and about the Kent campus or unlawfully detain them, and declaring any contrary acts to be unlawful.

(d) Enjoining Defendants, and their successors, from ordering or permitting Ohio National Guard troops in and about the Kent campus to break up and/or disperse peaceful meetings or assemblies or arrest persons for attending them, except that defendants may reasonably limit the place of such meetings for legitimate purposes other than to prevent their occurrence, and from declaring any suspension of the right of assembly and declaring any actions to the contrary to be unlawful.

(e) Declaring Section 2923.55 of the Ohio Revised Code to be unconstitutional and void; and

(f) Granting such other and further relief as this Court deems just and proper.

MOTION TO DISMISS, MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

(Caption, signatures, acknowledgments omitted)

MOTION TO DISMISS

Now come the defendants James A. Rhodes, Governor of Ohio, Sylvester Del Corso, Adjutant General, and Robert H. Canterbury, Assistant Adjutant General, by and through their attorney, Paul W. Brown, Attorney General, and move the Court to dismiss this action for the reason that the complaint fails to state a claim against them upon which relief can be granted.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

A reading of the complaint in the instant case discloses that plaintiffs are asking this Court to pass judgment on three points relating to the Ohio National Guard: (1) its training [Complaint, paragraph 12(b)], (2) its equipment (Ibid.), and (3) the immunity from liability of its members in the limited circumstances described in Section 2923.55, Revised Code, namely: when they are using "necessary and proper" force when suppressing a riot or dispersing or apprehending rioters [Complaint, paragraph 12(e)]. Further, plaintiffs ask the Court to enjoin the defendant Governor and his successors from "prematurely" ordering units of the Ohio National Guard to duty [Complaint, paragraph 12(a)].

While it is true that the Ohio Revised Code contains provisions relating to the Ohio National Guard, the training and service, supply and procurement functions of the Guard are controlled by federal law and regulations. See Article 32, Section 501 U.S. Constitution, *et seq.* and Article 32, Section 701, U.S. Constitution, *et seq.* Parenthetically, it is a matter of public knowledge that the defendant

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Adjutant General has already formally requested federal authorities to provide funds for non-lethal riot control devices for use by the Ohio National Guard, and had done so before the institution of this action.

Since federal law and regulations control them, it is clear that the complaint does not state a claim against the named defendants, all of whom are state officers, in regard to the training and equipment of the Ohio National Guard. If the Court determines, however, that the complaint does state such a claim, then it is suggested that the United States, or the appropriate agency thereof, would be an indispensably necessary part to this action, for the reason heretofore stated.

On the question of plaintiffs' attempt to prevent, by means of this action, a "premature" use of the Ohio National Guard in the future, it is submitted that any order of this Court couched in the terms plaintiffs suggest would constitute unwarranted judicial interference with the discretionary power of an executive officer of the state government and would pose grave problems of enforcement for the Court because of the very nature of the subject matter and the conditions under which questions of compliance with such an order would very likely be litigated.

As to the constitutionality of Section 2923.55, *supra*, it is submitted that this statute is so narrowly drawn that it can withstand the arguments plaintiffs would raise against it, and that these arguments, in fact, raise no substantial constitutional, or federal, question.

For the foregoing reasons, defendants urge that their motion to dismiss be sustained.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CRAIG MORGAN, et al.,
Plaintiffs,
v.
JAMES A. RHODES,
Governor of Ohio, et al.,
Defendants.

Case No. C 70-961

ORDER DISMISSING COMPLAINT

UPON CONSIDERATION,

This Court finds that the complaint in the above-captioned case fails to state a claim upon which relief can be granted in this Court. In accordance, it is

ORDERED, ADJUDGED and DECREED that the defendant's motion to dismiss is granted, and the case of *Morgan et al.* v. *Rhodes, et al.,* C 70-961 is hereby dismissed.

JAMES C. CONNELL, Judge
United States District Court

Dated March 4th, 1971.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The decision of the Court of Appeals was appended to Petitioners' Petition for a Writ of Certiorari.

Supreme Court of the United States

No. 71-1553

John J. Gilligan, Governor of Ohio, et al.,

Petitioners,

v.

Craig Morgan, et al.

ORDER ALLOWING CERTIORARI. Filed October 24 ----------, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth ---------- Circuit is granted.